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Supreme Court, U.S.
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No: 02-1500

IN THE

Supreme Court of the United States

HAROLD D. EYL, an individual,
Petitioner,

v.

CIBA-GEIGY CORPORATION, a New York Corporation,
NORTHEAST COOPERATIVE, a Cooperative Association,
and THE CITY OF WISNER, a Political Subdivision,
Respondents.

On Petition for a Writ of Certiorari
from the Supreme Court of Nebraska

RESPONSIVE BRIEF IN SUPPORT OF WRIT

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FURTHER REASONS TO GRANT WRIT

MR. EYL'S NON-LABELING BASED NEGLIGENCE CLAIM IS NOT PREEMPTED BY FIFRA.

Respondent The City of Wisner (The City) agrees with and adopts the arguments made by Harold Eyl in his Petition for a Writ of Certiorari. In addition, The City offers the following comments in support of granting a writ.

This was never a label case.

This was a case about warning people that aren't going to use the label.

There was no argument about the label at trial. This case is about other foreseeable plaintiffs such as Mr. Eyl. Foreseeable plaintiffs such as community members, other people working in the park besides the applicator who had the label, used the label and applied the Total Kill. This is about neighbors, community citizens and workers who would have occasion to come into contact with the Total Kill in the River Park in Wisner, Nebraska and would not know of the unreasonably dangerous toxic effect of the product. This is the point The City wishes to comment upon.

Ciba/Northeast continuously has attempted to make this a label case during the pretrial procedural aspects and trial of this case and succeeded in convincing the Nebraska Supreme Court of the same. Ciba/Northeast has misconstrued facts and testimony toward that end. Mr. Eyl and The City's claim against Ciba/Northeast in no way challenged the cautionary language on the label.

The label's cautions are *not* the warnings that could have prevented Mr. Eyl's catastrophic injuries. *Mr. Eyl was not the applicator of the Total Kill to whom the label was directed.* Ciba/Northeast could have warned the community and the people of the City of Wisner of the undisputed unreasonably dangerous and toxic nature of the chemical that was to be put down upon the ground.

Ciba/Northeast has ignored the bystander, the community and the people of the City of Wisner and this Court. Harold Eyl was a bystander. His claims are not preempted because his claim is that Ciba/Northeast should have warned through means other than the label. The City supports Mr. Eyl's claim that he should have been and could have been warned, like other members of the community, where he was not the applicator for whom the label would be intended.

Mr. Eyl did not apply the chemical. Mr. Eyl was not certified or licensed to apply chemicals. Tr. 54-55. Roland Johnson, the City utility superintendent, directed that Don Bode apply the herbicide Pramitol 5PS (Total Kill), the herbicide recommended by Northeast and manufactured by Ciba, to the playground areas. Tr. 76. Northeast knew that other people of the community and other workers would be exposed to the Total Kill.

It is undisputed, through multiple admissions and Ciba's own documents that Ciba had knowledge of the toxic dangers and resulting injuries from exposure to Total Kill. Dr. John Akins, a toxicologist and the claims adjuster assigned to this litigation file at Ciba, admitted that Ciba would issue warning flags for certain agricultural products. Tr. 1362, 1369-1371.

Apparently in those instances, Ciba would freely admit that FIFRA would not preempt a claim if a foreseeable plaintiff and innocent bystander was injured because they failed on an occasion to provide those flags and warnings outside of the label. Ciba sends out pamphlets, brochures, leaflets and newspaper articles to suppliers or communities that include information that is not duplicated on the label and does send out warnings flags to be posted in an application area. Tr. 1370-71. The evidence the jury heard was Ciba just did not do it here, for the community and persons such as Harold Eyl in the City of Wisner at River Park.

Northeast also admitted at trial that they had knowledge separate from the labels (Tr. 830) and that they would share this knowledge of the products they sold, information not on the labels, with their customers. Tr. 839-840. Northeast did not do so here.

Northeast knew that foreseeable plaintiffs, members of the community of the City of Wisner such as Mr. Eyl who risked exposure to the unreasonably dangerous and toxic Total Kill, were never advised of the potential danger of this substance (Tr. 844-45) and yet Northeast still did not provide any flags or posters or other warnings to the City of Wisner for this product.

Northeast <u>does</u> provide flags, postings and other warnings to customers for certain products. Tr. 848-49. It must be presumed, then, that Northeast does not believe that FIFRA preemption applies in cases where they do so. For some products, Northeast even made its own warnings, flags and such, irrespective of the materials received from chemicals manufactures. Tr. 849. Both Ciba and Northeast produce these additional warning systems. They produce

these systems because they know that foreseeable plaintiffs are out there who are not going to know the dangers of the product. Ciba/Northeast didn't do it here. They didn't warn Mr. Eyl.

The Nebraska Supreme Court acknowledged in a previous decision that the federal act's preemption clause would not bar all common law actions, just those "at odds with the labeling requirement set forth in the Act, with which the manufacturer complied," *Ackles v. Luttrell*, 252 Neb. 273 at 278-79, 561 N.W.2d 573 at 577 (1997), citing *Cipollone*. The Nebraska court in *Ackles* also cited *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), quoting " 'if Congress intended to preclude all common-law causes of action, it chose a singularly odd word ['requirement'] with which to do it.' " Id., quoting 518 U.S. at 487. Yet the Nebraska court failed to apply that standard to the undisputed facts and testimony of our case.

Respondents Ciba and Northeast take the party Medtronic's position, which this Court has already found untenable. "Under Medtronic's view of the statute, Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device." *Id.* Further, "Medtronic's construction of § 360k would therefore have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation...." *Id.*

> It is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those

> injured by illegal conduct,' *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984), and it would take language much plainer than the text of § 360k to convince us that Congress intended that result.

Id.

This Court properly concluded in that case that the "statute did not sweep nearly as broadly as Medtronic would have us believe that this statute does" *Id.* at 488, and "we cannot accept Medtronic's argument that by using the term 'requirement,' Congress clearly signaled its intent to deprive States of any role in protecting consumers from the dangers inherent in many medical devices." *Id.* at 489.

In the present instance, it was absolutely undisputed at trial that Mr. Eyl did not apply chemicals, had never applied chemicals, was not licensed to apply chemicals and certainly did not on this occasion apply the Total Kill/Pramitol 5PS. Tr. 38; 54-55; 76; 296-298; 327; and 959.

Ciba and Northeast both knew their product Total Kill was to be used in public places. Promotional materials such as Exhibit 154 (E154, Tr. 52), received at trial with no objection, promoted use in "recreational areas." Ciba and Northeast knew people *other than* the licensed and certified applicator would come into contact with Total Kill. Mr. Eyl's claim was not preempted. A jury was properly allowed to find that Ciba and Northeast failed to provide warnings in the form of non-label based warnings to foreseeable

plaintiffs, members of the community of the City of Wisner such as Mr. Eyl who risked exposure to the unreasonably dangerous and toxic Total Kill, who were never advised of the potential danger of this substance.

Because the testimony and other evidence in this case did not challenge the Total Kill label, and does not involve the applicator, this case implicates the split in appellate authority between courts that have held that the FIFRA preemption does not bar claims regarding lack of warnings to bystanders and those that do. *Compare Chemical Specialties Manufacturers Ass'n. v. Allenby*, 958 F.2d 941 (9th Cir. 1992) (no preemption), *with Papas v. UpJohn Co.*, 985 F.2d 516 (11th Cir. 1993). *See* Eyl Petition at 17-19. The Court should grant review to determine if any failure to warn claims are preempted by FIFRA and, if so, whether claims based solely on a duty to warn bystanders are preempted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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